

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7076

In The
United States Court of Appeals
For The Second Circuit

MILDRED A. McLEARN,

Plaintiff-Appellant,

vs.

COWEN & CO., MERRILL LYNCH PIERCE FENNER &
SMITH, INCORPORATED, BARRETT SINIWITZ and
LEONARD FUCHS, individually,

Defendants-Appellees.

*On Appeal from the United States District Court for the
Southern District of New York*

BRIEF FOR PLAINTIFF-APPELLANT

BURCHETTA, GOLDSAND & BURCHETTA, P.C.
Attorneys for Plaintiff-Appellant
48 Gleneida Avenue
Carmel, New York 10512
(914) 225-5544

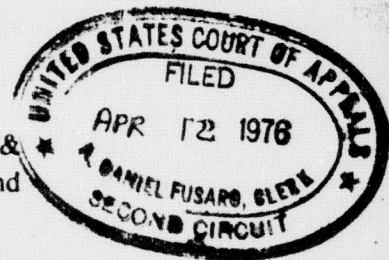


TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Nature of the Case	1
Course of Proceeding and Disposition of Case by District Court	2
Statement of Facts	2
Statement of the Issues Presented For Review	3
Argument	3
Point 1. Plaintiff's Complaint Complies With The Requirements of Rule 9(b)	3
Point 2. Plaintiff Is Not Required To Plead Detailed Evidentiary Matter In Her Complaint	6
Point 3. The Requirements of Rule 9(b) Are Relaxed As To Matters Within The Adverse Parties Knowledge	7
Point 4. Rule 9(b) Must Be Interpreted In Conjunction With The Requirements Of Rule 1 and Rule 8 Of The Rules Of Civil Procedure	8
Conclusion	10

TABLE OF CASES AND STATUTES

	PAGE
Selzer v Bank of Bermuda LTD 385 F. Supp. (1974)	6
Brady v Games 128 F. 2d 754 (1942)	6
Collins v Rukin 342 F. Supp. 1282 (1972)	6
Seligson v Plum Tree, Inc. 61 FRD 343 18 F.R. Serv. 2d 94 (1973).	7
Segal v Gordon 467 F. 2d 602 (1972)	8
Schlick v Penn-Dixie Cement Corporation 507 F 2d 374 (1974)	8
Carroll v First National Bank of Lincolnwood 413 F 2d 253 (7th Cir. (1969) cert. denied, 396 US 1003, 90 S. Ct. 552; 24 L Ed. 2d 494 (1970)	8
Conley v Gibson 355 U.S. 41 78 S. Ct. 99 2 L. Ed. 2d 80 (1957)	8
City of Davenport v Three-Fifths of an Acre of Land 1974 F. Supp. 794 (1939).	9

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-7076

MILDRED A. MC LEARN,

Plaintiff

-against-

COWEN & CO., MERRILL LYNCH PIERCE FENNER &
SMITH, INCORPORATED, BARRETT SINIWITZ and
LEONARD FUCHS, Individually,

Defendants

BRIEF FOR APPELLANT
MILDRED A. MC LEARN

STATEMENT OF THE CASE

Nature of the Case

This is an action instituted by the plaintiff, MILDRED A. MC LEARN, against the defendants herein for alleged violations of the Securities and Exchange Act of June 6, 1934, Chapter 4, Stat. 381, 15 U.S.C. 78, and Rule S-10B-5 promulgated pursuant thereto (17 C.F.R. Sec. 240. 106-5), and the Investment Advisors Act of 1940, 15 U.S.C. 80b-5 and 15 U.S.C. 80b-6 as well, for

damages for defendants breach of its common law standards of fiduciary responsibility owed to the plaintiff, and the defendants illegal, negligent, unethical and unprofessional conduct.

Course of Proceedings
and Disposition of Case by District Court

This is an appeal from the decision and opinion of Judge Metzner dated January 12, 1976 dismissing plaintiff's amended complaint for failure to aver fraud with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure.

Statement of Facts

After service of the original complaint upon the defendants, COWEN & CO. and MERRILL LYNCH PIERCE FENNER & SMITH, INCORPORATED, the said defendants respectively moved to dismiss said complaint for failure to aver fraud with the requisite particularity required by Rule 9(b) and for an order directing plaintiff to serve and file a more definite statement. Judge Metzner rendered the Court's decision dated July 30, 1975 dismissing plaintiff's complaint with leave to file an amended complaint within twenty days after the date of said order. The plaintiff caused properly to be served upon the defendants an amended complaint pursuant to the July 30, 1975 order. Thereafter, the defendants again moved to dismiss plaintiff's amended complaint on the same grounds. Judge Metzner, in a decision and opinion dated January

12, 1976, dismissed plaintiff's amended complaint. This is an appeal from that order of dismissal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Does the plaintiff's amended complaint, in light of the unique facts and circumstances of this case, comply with the particularity requirements of Rule 9(b), and should the defendants be directed to interpose a responsive pleading to same?

ARGUMENT

1. PLAINTIFF'S COMPLAINT COMPLIES WITH THE REQUIREMENTS OF RULE 9(b).

The requirements, as set forth in Rule 9(b) with all averments of fraud and the circumstances constituting fraud be stated with particularity, has been fully complied with by the plaintiff. The plaintiff has not simply pleaded conclusory statements, nor has plaintiff used standard "boiler plate" statutory language to establish her claim. For example, in the first cause of action against COWEN & CO., the plaintiff has in paragraphs numbered "FOUR" through "TWENTY-FOUR" pleaded detailed information including the fact that plaintiff was approached by the defendant who induced and pressured plaintiff into entering into an illegal and unethical contract, the terms of which were fully set forth in the complaint. The complaint further sets forth the date upon which said illegal agreement was consummated

indicating that securities and cash were given by plaintiff to defendant in addition to a general power of attorney over said stocks and cash. The plaintiff further pleads and describes meetings which were held between plaintiff and defendant at defendants corporate offices in furtherance of defendants scheme, and sets forth defendants inducements and advices, all of which plaintiff relied on to her detriment. In paragraph numbered "EIGHTEEN" of the complaint, the plaintiff has set forth factual statements and conclusory allegations supported by facts previously set forth in the complaint. Paragraph "EIGHTEEN" should not be isolated and analyzed independently but should be read and interpreted in conjunction with the other paragraphs of the complaint, setting forth facts and information in detail.

With respect to MERRILL LYNCH PIERCE FENNER & SMITH, INCORPORATED, and the causes of action addressed to them, the plaintiff has pleaded in detail plaintiff's meeting with corporate officers and representatives (page 13, paragraph 33, amended complaint) and the fact that plaintiff in November 1972 entered into an investment arrangement with said defendants (page 14, paragraph 35, amended complaint). The plaintiff further pleaded in detail the representations and advices rendered to her (page 14, paragraph 34, and page 15, paragraph 36, amended complaint) and the fact that said defendant refused to discuss plaintiff's account, follow her directions and deceived plaintiff as to the condition of her account (paragraphs 38 through 49, amended

complaint).

The complaint herein properly and sufficiently apprises the defendant of the conduct for which the plaintiff sues. For example, in paragraph numbered 18, page 6, of the amended complaint, the plaintiff alleges that the defendants "failed to exercise prudent judgment, acted in bad faith, breached the fiduciary obligation owed by said defendants to the plaintiff...". The plaintiff detailed and explained this statement by continuing in that paragraph the explanation that defendants did in fact act in bad faith and breached the fiduciary obligation "in purchasing speculative stocks margined to the limit and not revealing the extent and degree of margin assumed". The requirements of Rule 9(b) were met with respect to this allegation. Plaintiff should not be required in a complaint to list the stocks purchased by defendant (see Argument, Point 2, below) nor should plaintiff be required to recite information which defendants have equal or better knowledge of. The plaintiff further alleges, in paragraph "EIGHTEEN" that the defendants action breached their fiduciary duty owed to the plaintiff "in repeatedly omitting to inform plaintiff of material facts with respect to securities recommended for purchase and for sale from plaintiff's account, including the degree of risk involved in purchasing securities defendant chose to purchase for plaintiff, the indicators of present and future financial strength and weakness". This allegation meets the

requirements of Rule 9(b). The plaintiff alleges that the defendants failed to inform plaintiff of material facts. The plaintiff cannot recite the dates and times when said omission occurred but rather it was a failure which existed from the beginning to the end of their relationship. In addition, a close reading of paragraph "EIGHTEEN", which is representative of the other causes of action in the complaint, clearly indicates that the plaintiff has set forth each and every fact and circumstance known to her, and that the defendants are capable of framing a responsive pleading to said complaint. Selzer v Bank of Bermuda LTD., 385, F. Supp. (1974).

2. PLAINTIFF IS NOT REQUIRED TO PLEAD DETAILED EVIDENTIARY MATTER IN HER COMPLAINT.

The Federal Rules of Civil Procedure do not require plaintiff to set forth detailed evidentiary matter in her complaint. Brady v Games, 128 F. 2d 754 (1942); Collins v Rukin, 342 F. Supp. 1282 (1972). In addition, the defendants have caused to be served upon the plaintiff voluminous written interrogatories of at least two hundred pages which must be answered by plaintiff. The defendants, COWEN & CO. and MERRILL LYNCH PIERCE FENNER & SMITH, INCORPORATED, are corporations specializing in security investments and, as such, undoubtedly have in their possession detailed records of each and every transaction with plaintiff and the exact nature of their relationship, including all conferences and representations made by them to plaintiff. This fact, together

with the detailed information submitted by plaintiff in the complaint, should compel this Court to direct defendants to respond to said complaint. Furthermore, the statements set forth in the paragraphs of the complaint are fully evidenced and substantiated by all the facts and information known to plaintiff at this time. In fact, the plaintiff has pleaded and asserted facts which could rightfully be considered to be detailed evidentiary matter. The defendants will have the opportunity to gather further particularities during discovery. In fact, the answers to the two hundred pages of interrogatories, if not objected to and answered by the plaintiff, would supply the defendants with information far beyond what is required. In Seligson v Plum Tree, Inc., 61 FRD 343 18 F.R. Serv. 2d 94 (1973), the Court stated at page 347:

"Rule 9(b) does not require, nor does this Court intend, the plaintiffs be barred from bringing an action based on fraudulent misrepresentation. Nor do we require plaintiffs to perform the impossible. They have alleged fraud with as much specificity as they are able to do without further discovery. Plaintiffs have now pleaded with sufficient particularity to apprise defendants of the alleged fraudulent misrepresentations as well as how they were conveyed to plaintiffs and during what time period. Further particularities may be explored by both sides during discovery. Rule 9(b) understood in the context of the liberal Federal Rules of Pleading requires no more."

3. THE REQUIREMENTS OF RULE 9(b) ARE RELAXED AS TO MATTERS WITHIN THE ADVERSE PARTIES KNOWLEDGE.

As is indicated in Argument, Point 2 above, the corporate defendants have available to them detailed accounts and information

concerning their dealings with the plaintiff and, in fact, possess more information and facts than does plaintiff. Defendants undoubtedly have a complete record of plaintiff's stock transactions, copies of all agreements entered into between plaintiff and defendants, records of meetings, statements made by them, etc.. The Court in Segal v Gordon, 467 F. 2d 602 (1972) held that the requirements of Rule 9(b) should be relaxed as to matters within the adverse parties knowledge. The defendants herein would not be prejudiced in any way if required by this Court to interpose an answer based upon the amended complaint as drafted.

4. RULE 9(b) MUST BE INTERPRETED IN CONJUNCTION
WITH THE REQUIREMENTS OF RULE 1 AND RULE 8
OF THE RULES OF CIVIL PROCEDURE.

The cases interpreting Rule 8 and Rule 9(b) have held that the requirements of Rule 9(b) should not be used as a "game of skill" and should not serve the purpose of denying a litigant his day in court and a proper determination on the merits. These Rules should be construed in conjunction with each other. Schlick v Penn-Dixie Cement Corporation, 507 F 2d 374 (1974); Carroll v First National Bank of Lincolnwood, 413 F 2d 253 (7th Cir. (1969), cert. denied, 396 US 1003, 90 S. Ct. 552; 24 L. Ed. 2d 494 (1970). The Supreme Court of the United States, in Conley v Gibson, 355 U.S. 41 78 S. Ct. 99 2 L. Ed. 2d 80 (1957), stated at 355 U.S. at page 47

"...all the rules require is 'a short and plain statement of the claim' and will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests...The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principal that the purpose of pleading is to facilitate a proper decision on the merits."

Rule 1 of the Rules of Civil Procedure directs that the procedural rules "be construed to secure the just, speedy, and inexpensive determination of every action". The cases interpreting said Rule have held that one of the technical objectives of the Rules of Procedure is "to avoid a strict technical interpretation which might work a hardship upon the litigants. City of Davenport v Three-Fifths of an Acre of Land, 1974 F. Supp. 794 (1939).

It is clear that the purpose of the Rules of Civil Procedure, including Rule 9(b), is to secure substantial justice and to protect the rights of the litigants before the courts. The complaint in this action should not have been dismissed. The plaintiff, as set forth in the complaint, placed her complete trust and faith in the corporate defendants. They abused that trust and are attempting now to prevent a litigation on the merits by asserting that plaintiff, a widow whose husband recently died prior to her involvement with the defendants, should plead the information and facts which they already have in their possession. Does not justice cry out in this case, and should not the plain-

tiff be given an opportunity to present her case to the Courts? The defendants herein will not be prejudiced in any way. Prior to the time of trial the plaintiff will be required to submit answers to the two hundred pages of interrogatories. The defendants argument that they have no idea as to the nature of plaintiff's claim is utterly ridiculous and is beyond belief. The Court must take into consideration also the fact that plaintiff was forced to enter into an illegal and prohibitive contract with COWEN & CO. and MERRILL LYNCH PIERCE FENNER & SMITH, INCORPORATED, whereby plaintiff gave to them the power and control over her accounts. The defendants acted independently and, as it turned out, against plaintiff's interest to her detriment and damage. The plaintiff cannot plead information and facts which she does not have in her possession or have knowledge of, and her case should not be dismissed when, in fact, the information defendants suggest plaintiff to have pleaded is in their own possession and knowledge.

CONCLUSION

THE ORDER OF JUDGE METZNER, DATED JULY 12th, 1976 DISMISSING PLAINTIFF'S AMENDED COMPLAINT SHOULD BE REVERSED AND THE DEFENDANTS SHOULD BE ORDERED TO INTERPOSE A RESPONSIVE PLEADING TO THE AMENDED COMPLAINT.

Respectfully submitted,

BURCHETTA, GOLDSAND & BURCHETTA P.C.
Attorneys for Appellant
Office and Post Office Address
48 Gleneida Avenue
Carmel, New York 10512
Telephone: (914) 225-5544

**COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**MILDRED A. MC LEARN,
Plaintiff- Appellant,**

- against -

**COWEN & CO.etal.,
Defendants- Appellees.,**

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York

That on the 12th day of April 19 76 at 1) One Liberty Street, New York, New York
2) One Chase Manhattan Plaza, New York, New York
deponent served the annexed ~~Appendix~~ **Brief** upon

the ~~Attorneys~~ **1) Brown Wood Fuller Caldwell &
2) Wilkie Farr & Galliger**
in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein.

Sworn to before me, this 12th
day of April 19 76

Robert T. Brin

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977